



Memorandum

Date: November 11, 2010
To: Senator Chuck Gross
Steven Stogel
From: Bryan Cave LLP
Re: Missouri State Tax Credit Review Commission: Proposed
Tax Credit Acquisition Program

Bryan Cave LLP
One Metropolitan Square
211 North Broadway
Suite 3600
St. Louis, MO 63102-2750
Tel (314) 259-2000
Fax (314) 259-2020
www.bryancave.com

In connection with the Missouri State Tax Credit Review Commission's activities, it has been suggested that the Commission consider the establishment and funding of a Tax Credit Acquisition Program ("TCAP") for the repurchase by the State of outstanding state tax credits at a discount using an electronic auction format. The idea of a governmental entity using an electronic auction procurement system is by no means novel. The States of Ohio (Title 1 - §125.072 of the Ohio Revised Code), Pennsylvania (Title 62, Chapter 5 of the Pennsylvania Code), Texas (Sections 2155.062 and 2155.085 of the Texas Code) and Connecticut (Sec. 4a-60b of the General Statutes of Connecticut) have each passed legislation authorizing the purchase of goods and/or supplies via electronic auction.

The repurchase of outstanding state tax credits could provide the state with an efficient method for the de-commissioning of outstanding state tax credits (at a discount) that otherwise will negatively impact future state revenue. It is thought that any such program could be engineered in a way that it could be used with respect to a variety of different tax credit programs, including low income, affordable housing, historic and brown field. However, a repurchase protocol would need to be established that would provide a transparent and objective system for determining how tax credits are to be repurchased, which tax credits should be repurchased and the purchase price for such tax credits. The precise mechanics of such a repurchase protocol is beyond the scope of this memorandum. We would observe, however, that some form of electronic auction procedure would likely serve as a simple and efficient method to effectuate the repurchases.

To implement a TCAP, the State would be required to establish an organizational framework to develop and provide oversight to the program. Specifically, legislation would be required that expressly authorizes the repurchase of tax credits, and that creates a Tax Credit Repurchase Board (the "Board") authorized to (among other powers to be determined): (i) develop and implement TCAP; (ii) promulgate rules and regulations and establish policies and procedures to implement TCAP; (iii) enter into agreements with investment banking firms or other financial institutions to assist with the purchase of tax credits, and otherwise as required for the operation and administration of TCAP; and (iv) enter into purchase agreements with sellers of tax credits. In

addition, it is likely that such legislation would need to include authorization for the use of electronic auction style procurement methods with respect to procurement of the tax credits, as referenced above.

The exact composition of the Board is beyond the scope of this memorandum. It has been suggested, however, that at a minimum it should be composed of five individuals with experience and knowledge in the areas of tax credit financing and investment banking, two of whom would be selected one each by the majority and minority leaders of the Senate, two of whom would be selected one each by the majority and minority leaders of the House of Representatives, and one of whom would be selected by the Governor.

There already is precedent in Missouri for the establishment of the Board. Missouri Revised Statutes Section 166.415, established the Missouri Higher Education Savings Program and its oversight board (the “Missouri MOST Program”). The implementing legislation for the Missouri MOST Program provides a useful example of how TCAP might be legislatively established in a way that permits the creation of an independent oversight board that is empowered, among other things, to enter into contracts on behalf of the State for the provision of procurement services by private investment banking and other financial institutions.

It would appear that a number of funding sources might be available to fund a TCAP. We understand that a substantial amount of stimulus funds remains available that might effectively be used to fund a program such as a TCAP. Alternatively, the General Assembly might decide to appropriate other non-stimulus funds to establish and implement the program. It is also possible that the State might elect to access the capital markets to borrow the funds necessary to finance the program, thereby amortizing the cost of the program beyond any applicable tax credit redemption period. Because the tax credits would be repurchased by the State at a discount, the positive effect on State revenues would likely more than cover the financing costs associated with any such borrowing.

In the course of the Commission’s deliberations with respect to this topic, we would suggest that there should be consideration given to some of the practical elements of a TCAP and what the effects of such elements may have on the program’s desirability or value to the State. Also, it should be noted that implementation of a TCAP would require compliance with applicable state and federal banking and securities laws and regulations.